U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

Deny

File: EAC 99 025 53137 Office: Vermont Service Center Date: JAN 11 2000

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER: [redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director of the Vermont Service Center. The matter is now before the Associate Commissioner on appeal. The appeal will be dismissed.

The petitioner, a corporate fitness consultant, petitioned on October 26, 1998 to employ the beneficiary for three years from October 15, 1998 as an athletic trainer in the H-1B classification for specialty occupations. The director requested additional evidence in a notice issued November 23, 1998 and the petitioner responded on January 11, 1999. In a decision issued March 16, 1999 (denial), the director determined that the position did not qualify as a specialty occupation. The petitioner appealed on April 15, 1999 and provided a Brief in Support of Motion to Reconsider/Reopen (appeal brief). Counsel inferred ill will from such circumstances as the time between the petitioner's January 11, 1999 response and the denial on March 16, 1999. The petition itself was not filed until 11 days after the beneficiary's intended employment was to begin. Implications of prejudice in the appeal brief, at 5, were too speculative to affect the proceedings.

Provisions of § 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(i)(b), accord nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. The definition in § 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), describes a "specialty occupation" as one which requires theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Before all else, the petitioner must show that the beneficiary is coming to the United States to perform services in a specialty occupation. The appeal brief, at 6, maintained that the dual degrees which some personnel had, with additional evidence, demonstrated the highly specialized nature of the position of the center director at each of the petitioner's health facilities.

The appeal brief summarized, at 3-4, degrees of center directors' subordinates, all except one with at least a bachelor's degree and often in health or exercise science. It continued, at 4,

> The employer takes exception to the quip offered by the Service: " ... it appears that many of the duties ... could adequately be performed by [one] who has attended various seminars and workshops in [p]hysical training." If this were the case, [the petitioner] would presumably not have been acquired by [another firm].

The appeal brief, at 2-3, introduces the job description of the petitioner's senior exercise specialist and argues,

> Of note is the fact that as the job description implies, the Center Directors oversee other trainers, all but one of whom possess Bachelors degrees. Those without degrees directly related to the health sciences are not promoted to the position of Center Director and are not considered "management track trainers"....

As with the denial, the record still has no position description for center director or athletic trainer. The record proposes two other capacities for the beneficiary's employment, as a general manager or senior exercise specialist. The data indicate that Plus One Fitness Center offers the general manager's position. It is a third party which did not file this petition. The appeal asserts the petitioner's hiring of the beneficiary as a center director, not as an athletic trainer under the petition. The record had neither the mandated copy of the contract nor summary of the terms of the oral agreement between the third party or petitioner and the beneficiary to clarify the position or the specialty occupation. 8 C.F.R. 214.2(h)(4)(iv)(B).

The petitioner offered no position description at all for its center director. That for its senior exercise specialist lacks any unambiguous element of supervision. Evidence on appeal clarifies that the third party acquired the petitioner in a takeover and extinguished the target's job structure and positions. No importing employer exists as a petitioner to maintain an H petition. See § 214(c)(1) of the Act, 8 U.S.C. 1184(c)(1). Neither the defunct petitioner nor the third party provided a contract or summary of terms of an agreement with the beneficiary. 8 C.F.R. 214.2(h)(4)(iv)(B). The record does not permit the identification of the petitioner or the position in which this beneficiary was coming to the United States to perform specific duties in a specialty occupation. See § 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1).

Finally, the Labor Condition Application, dated November 30, 1998 (LCA), named the defunct petitioner as the employer. It designated a specialty occupation, athletic trainer, which the evidence contradicts. Since the petitioner obtained the LCA more than a month after the filing of the petition, the LCA does not meet the terms of the regulation. 8 C.F.R. 214.2(h)(4)(i)(B)*(1)*.

Counsel has cited an unpublished decision of the Service, said to control as a virtually identical matter. Its relevance is limited. The absence of a contract, petitioner, and valid LCA distinguish these proceedings. Further, Service decisions which are designated as binding precedents are published and made available to the

public pursuant to 8 C.F.R. 103.3(c). Unpublished decisions are neither precedents nor binding.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.